Supreme Court, U.S.
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No. 01-1112

IN THE

Supreme Court of the United States

CHRISTIAN A. HANSEN and ALFRED R. TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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DISCUSSION

Respondent fails to address the two primary arguments that Christian Hansen and Al Taylor raise in their Petition that merit this Court granting *certiorari* and reversing the decision of the Court of Appeals. First, both Hansen and Taylor were convicted of a combined 32 felony counts under the responsible corporate officer doctrine for environmental violations over which they had no responsibility or authority. Second, the Court of Appeals affirmed the District Court's determination that RCRA and the CWA are public welfare statutes, and by doing so improperly reduced the *mens rea* requirement and convicted Hansen and Taylor without proving that Petitioners had the requisite knowledge of each element of the statutory crimes.

Respondent also misunderstands Petitioners' reliance on *United States v. Bestfoods*, 524 U.S. 51 (1998), which requires a nexus between a person and the conduct underlying the violation before civil liability under CERCLA attaches. The Court of Appeals decision in *Hansen* allows the strange result of requiring a nexus between a person and an act in the civil but not the criminal context. Similarly, Respondent ducked Petitioners' argument that the tension between RCRA and the CWA and the Bankruptcy Code placed Petitioners in an impossible situation because under the responsible corporate officer doctrine Petitioners were required to act but did not have the means or authority to act.

A. Petitioners Cannot Be Criminally Liable For Violations That Occurred When They Were Not "Responsible Corporate Officers."

The crux of the responsible corporate officer doctrine is that the person charged has responsibility or authority "with respect to the conditions that formed the basis of the alleged

violations." *See United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991) (*quoting United States v. Park*, 421 U.S. 658 (1975)). Here, that requires responsibility for or authority over the environmental operations of the Brunswick plant at the time a particular violation of the CWA, RCRA or CERCLA occurred. While Hansen and Taylor both managed the Brunswick plant at various times, Respondent ignores, as did the District Court and the Court of Appeals, that Hansen was no longer in a position of authority or control for twenty-two of the counts for which he was convicted and Taylor was no longer in a position of authority or control for ten of the counts for which he was convicted. (*See* 01-1112 Pet. 10.)

As to Hansen, Respondent cites to an unsupported section of the Court of Appeals' Opinion to argue that "the Court of Appeals expressly found that Petitioners contributed to the violations." (01-1104 and 01-1112 Resp. 16.) While the Court of Appeals may have "found" that the twenty-two violations occurring after Hansen left the Brunswick plant to seek treatment for his severe arthritis "occurred at his direction," there is no citation to the record and no support for that finding. Similarly, Taylor's presence at the Brunswick plant after he had expressly declined to resume a managerial role did not place him in a position of responsibility or authority for ten of the Counts under which he was convicted.

Respondent further contends that *United States v. Bestfoods*, 524 U.S. 51 (1998), *United States v. Anthony Dell'Aquilla Enter. & Subsidiaries*, 150 F.3d 329 (3d Cir. 1998), and *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998), are irrelevant because they involve statutory provisions imposing strict liability under CERCLA for persons' "status as operators." (*See* 01-1104 and 01-1112

Resp. 17.) Respondent misses the point of Petitioners' argument. Even civil liability under CERCLA, which imposes strict liability and reaches broadly to any person who operates a facility, requires a nexus between the person and the acts forming the basis of the violation. Here, the Court of Appeals turned criminal liability on its head by affirming convictions where persons would not be civilly liable because they have no connection to the violations.

Respondents raise *Pinkerton* in answer to Petitioner's argument that they cannot be charged for violations when they were no longer present or in a position of authority at the facility. (*See* 01-1104 and 01-1112 Resp. 16-17.) *Pinkerton* should not be applicable in the already attenuated liability scheme created by the responsible corporate officer doctrine. Applying *Pinkerton* to this case takes criminal liability, especially liability predicated on specific intent as expressed in RCRA and the CWA, too far. Petitioners' conviction under the responsible corporate officer doctrine requires Petitioners to be in a position of *responsibility* vis-a-vis the violation. After resigning from their managerial roles and/or leaving the facility, Petitioners were no longer in positions of responsibility. *Pinkerton* does not permit attribution of a co-conspirator's "status" to another defendant, *i.e.* his or her position of "responsibility." *See United States v. Moore*, 29 F.3d 175, 178 (4th Cir. 1994) (declining to apply sentencing enhancement to co-conspirator under *Pinkerton* because it was premised on defendant's status of having a relationship of trust with victim). Hansen and Taylor had no responsibility over the environmental operations of the Brunswick plant at the time many of the violations occurred, and responsibility for those violations cannot be imputed to Petitioners through a *Pinkerton* instruction.

In *Hansen*, the Court of Appeals extended the bounds of criminal liability beyond reason. Because it removed any requirement that there be a nexus between the person and the actual violation, it opens the door to employees, officers and directors of a company being found criminally liable regardless of their actual involvement in or responsibility for violations of environmental statutes.

B. The Court of Appeals Affirmed The District Court's Improper Decision That RCRA And The CWA Are Public Welfare Statutes.

Respondent suggests that "the Court did not treat felony violations of the CWA and/or RCRA as 'public welfare' offenses." (01-1104 and 01-1112 Resp. 10.) Respondent is simply incorrect. The Court of Appeals based its determination, at least in part, on cases that treat environmental statutes as public welfare statutes. (*See* 01-1112 Pet. 52a, 63a-64a (*citing United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986)). Moreover, the Court of Appeals affirmed the District Court's decision, which expressly determined that the CWA, RCRA and CERCLA were public welfare statutes. (*See* 01-1112 Pet. 93a-97a.) Respondent ignores the basis for the District Court's holding and Petitioners' convictions under those statutes.

The Court of Appeals affirmation of the District Court's decision is in direct contravention to this Court's holdings in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994) and *Staples v. United States*, 511 U.S. 600, 616 (1994). The Court of Appeals improperly reduced the Government's burden of proof by determining that RCRA, the CWA and CERCLA are public welfare statutes and thereby eliminating the *mens rea* requirement of "knowingly" expressly provided

in RCRA and the CWA. *See United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (declining to hold that the CWA is a public welfare statute); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Cir. 1991) (distinguishing RCRA from the public welfare statutes at issue in *Dotterweich* and *Park*). The Court of Appeals barely touched on the basis for the District Court's decision, but its affirmation of that decision – applying the responsible corporate officer doctrine to statutes that require explicit knowledge and impose severe criminal penalties – is at odds with this Court's precedent.

Respondent cannot controvert that the basis of Hansen's and Taylor's convictions was the District Court's finding that the CWA, RCRA and CERCLA are regulatory laws in the interest of public health, safety and welfare. (*See* 01-1112 Pet. 93a.) Because of this finding, the District Court "declined to impose an onerous *mens rea* requirement," and instead presumed "knowledge of the regulatory requirements . . . and knowledge of acts performed in connection" with the violations. (*Id.*) The District Court improperly reduced the Government's burden of proof. The District Court, the Court of Appeals and Respondent all fail to address this Court's admonition that the Government must demonstrate that Petitioners possessed the necessary *mens rea* for each element of a statutory crime where the statute expressly includes a *scienter* requirement and the penalties are severe. *See Staples*, 511 U.S. at 618 ("punishing a violation as a felony is simply incompatible with the theory of the public welfare offense"); *X-Citement Video*, 513 U.S. at 71 (the *mens rea* requirement must be applied to each element of the crime).

The inclusion of the blanket responsible corporate officer instruction permitted the jury to convict Petitioners of violations without proof that they had actual knowledge of

each element of the statutory crimes. The District Court failed to instruct the jury regarding the circumstances that determine when a defendant may be liable under the responsible corporate officer doctrine, *inter alia*, that defendants had knowledge of the facts that lead to the violation and the authority or capacity to either order the violations or prevent them. Here, Hansen and Taylor were convicted of many violations of which they had no knowledge of the underlying facts and no authority to control or prevent. This is particularly evident in Petitioners' conviction for violations when they were absent from or no longer managing the Brunswick plant and in Petitioners conviction for knowing endangerment under RCRA, which requires specific, not inferred, knowledge. Plaintiffs were convicted based on the inference that they knew of RCRA violations because of their purported status as responsible corporate officers, rather than actual proof that they knowingly failed to prevent, detect or correct a violation.

Petitioners Hansen and Taylor were convicted of felonies and sentenced to more than 9 years and 6 years of prison respectively. By affirming the District Court's decision in *Hansen*, the Court of Appeals broadens the scope of criminal liability despite this Court's express holdings to the contrary. *See Staples*, 511 U.S. at 618; *X-Citement Video*, 513 U.S. at 71. This Court should grant *certiorari* in order to bring environmental criminal liability in line with its prior decisions concerning other statutory crimes and, once and for all, address the split among the Courts of Appeals as to whether RCRA and the CWA are public welfare statutes.

C. This Court Should Resolve The Conflicting Objectives Of The Federal Bankruptcy Act and Environmental Statutes.

The tension between the Bankruptcy Act and RCRA and the CWA is squarely presented to this Court, and coupled with the District Court's and Court of Appeals' errors regarding the application of the responsible corporate officer doctrine, involves important issues of federal law. The inability of Petitioners to fully address environmental conditions at the Brunswick plant as a result of Hanlin's bankruptcy combined with the instruction that they were responsible corporate officers resulted in their conviction for violations that they could not prevent.

Petitioners control over the operations of the Brunswick plant was limited by the oversight of the bankruptcy court and the shift in decision-making authority within the company and a lack of funds. In order to make decisions regarding the type environmental expenditures that were necessary at the Brunswick plant, petitioners required the approval of the bankruptcy court. *See In re Allegheny Int'l, Inc.*, 158 B.R. 343, 353-54 (Bankr. W.D. Pa. 1992). Funds for maintenance, repair and environmental compliance were restricted, and all decisions regarding these funds shifted from Petitioners to the Board of Directors, Creditors Committee and the bankruptcy court. (*See* 01-1112 Pet. 4-5.)

Petitioners were placed in a catch-22 by their conflicting duties to their shareholders and creditors under the Bankruptcy Act and their duties to comply with environmental laws. Under the Bankruptcy Act, Petitioners, as debtors-in-possession, were required to carry out the fiduciary duties of a trustee, including maximizing the value of the estate for the debtor's creditors. *See Tenn-Fla Partners*

v. First Union Nat'l Bank of Fla., 229 B.R. 720, 736 (Bankr. W.D. Tenn. 1999). By determining that Petitioners "reached a tacit agreement to operate the plant in violation of environmental laws" (*see* 01-1112 Pet. 51a), the Court essentially criminalized conduct that was required of them under the Bankruptcy Act – to operate the Brunswick plant for the benefit of their shareholders.

Again, Petitioners do not contend that they should be insulated from environmental laws as a result of Hanlin's bankruptcy. However, there is a problem with basing Petitioners' conviction on a responsible corporate officer instruction when Hanlin's bankruptcy severely circumscribed their ability to respond to the environmental issues at the Brunswick plant. The record is replete with examples where, despite their best efforts to address environmental issues at the Brunswick plant, Petitioners simply lacked the funds or authority to correct problems and prevent violations. (*See* 01-1112 Pet. 4-6.) Here, Petitioners' bankrupt company was confronted with conflicting obligations under the law, and this Court must resolve which obligations take precedence.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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